

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BYRON M. BLAKE,

Petitioner,

CASE NO. 2:09-cv-00106
JUDGE HOLSCHUH
MAGISTRATE JUDGE KEMP

v.

DELAWARE COUNTY JAIL,

Respondent.

OPINION AND ORDER

On February 18, 2009, the Magistrate Judge issued a *Report and Recommendation* pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts recommending that the instant petition for a writ of habeas corpus be dismissed without prejudice as unexhausted. Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation*. For the reasons that follow, petitioner's objections are **OVERRULED**.

In this federal habeas corpus petition, petitioner asserts that he was denied the effective assistance of trial counsel, and denied a fair trial based upon prosecutorial misconduct. As discussed in the Magistrate Judge's Report and Recommendation, to the extent that these claims rely on matters not readily apparent from the face of the record, such claims are properly raised in petition for post conviction relief pursuant to O.R.C. §2953.21. According to petitioner, on December 3, 2008, he filed a petition for post conviction relief, and on February 9, 2009, he received the State of Ohio's response. See Petition;Objections. Additionally, if petitioner raises claims that are readily apparent from

the face of the record, such claims are properly raised on direct appeal. Although the time period to file a timely appeal has now expired, petitioner may file a motion for delayed appeal pursuant to Ohio Appellate Rule 5(A). Therefore, for the reasons discussed by the Magistrate Judge, this Court likewise concludes that the instant petition remains unexhausted.

Petitioner, however, contends that this Court should nonetheless consider the merits of his claims because he is *pro se*, housed in the county jail and without access to legal material and without the assistance of counsel. Additionally, petitioner contends that he has been denied access to the court and is unable to exhaust state court remedies. *See Objections.*

These arguments are not persuasive. The record fails to support petitioner's claim that he has been unable to access the state courts. Petitioner states that he has filed a request for the assistance of a public defender, filed a post conviction petition, and a state habeas corpus petition. Prison officials also advised him to contact his prior attorney to assist him in obtaining counsel for an appeal. While petitioner has not pursued a delayed appeal, nothing in the record supports his claim that he may not still do so.

Pursuant to 28 U.S.C. 636(b), this Court has conducted a de novo review of the Magistrate Judge's *Report and Recommendation*. Petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

Date: March 23, 2009

/s/ John D. Holschuh
JOHN D. HOLSCHUH
United States District Judge